Marquette Law Review

Volume 20
Issue 4 *June 1936*

Article 9

Chattel Mortgages - Stocks of Goods to be Sold in Trade - Fraudulent Conveyances and Preferences

Vernon X. Miller

express agreement, it has been held that an agreement by implication arises and that delivery on such a side track or platform is sufficient. *South and North Alabama R. Co.* v. *Wood,* 66 Ala. 167, 41 Am. Rep. 749 (1880). Supporting a delivery not made at a warehouse, depot, or team track, the reason is given that such a delivery is the best the carrier can make under the circumstances and that such delivery is within the contemplation of the parties. *Louisville & N. R. Co.* v. *Gilmer,* 89 Ala. 534, 7 So. 654 (1890). Delivery must also be at a place where it is suitable and convenient for the consignee to unload before demurrage charges may be collected. *B. & O. R. Co.* v. *James Fisher & Son,* 5 Ohio S. & C. P. 659, 3 Ohio N. P. 122 (1896). As to delivery by the carrier upon the consignee's privately owned side track, the courts generally hold that the carrier has a duty, when the freight is so consigned, to deliver it upon the private siding before any demurrage charges can be collected. Note (1919) 1 A.L.R. 1425.

ROBERT J. BUER.

CHATTEL MORTGAGES—STOCKS OF GOODS TO BE SOLD IN TRADE—FRAUDULENT CONVEYANCES AND PREFERENCES.—The debtor was engaged in the retail hardware business. He owed the furnace company $272 on open account for furnaces and furnace equipment purchased from the company for sale through the hardware shop. Without additional consideration, and at the furnace company's request, the debtor executed and delivered to the company to secure its open account a note and a chattel mortgage covering the debtor's stock in trade. The mortgage was filed within several days. Three months thereafter the debtor made an assignment for the benefit of creditors. The trustees for the creditors took possession of the store with all the fixtures, book accounts, and stock of goods, including the property covered by the chattel mortgage. The trustees refused to recognize the furnace company's claim for preference. Thereupon the furnace company took possession of the goods covered by the mortgage, apparently with the trustees' consent, and the trustees began this action, described as a replevin action, against the furnace company. The case was tried by the court. The trial judge found that the proceeds derived from the sale of goods in the course of business had not been applied on the mortgage debt, that no replacements to the stock had been made by the debtor, and that the proceeds had been used by the debtor for his own purposes. The court concluded that the mortgage was void as to creditors and ordered judgment for the trustees for possession of the goods or in the alternative for the sum of $600. On appeal, *held,* judgment reversed and a new trial ordered; until it could be determined that the mortgagee had originally agreed to the debtor's unrestricted use of the proceeds of sales, or that the mortgagee had knowingly permitted such use, the security device was not a fraudulent conveyance. *Wymelenberg* v. *Badger Furnace Co.,* (Wis. 1936), 265 N.W. 718.

A chattel mortgage on a stock of goods to be sold in trade is a precarious security device. The physical security is disposed of by the debtor in the regular course of business. Replacements to the stock are after acquired chattels and a mortgagor cannot mortgage that which he does not have. *Chynoweth* v. *Tenney,* 10 Wis. 397 (1860). Such was the common law rule which has been changed by statute in Wisconsin as it pertains to stocks of goods to be sold in trade. WIS. STAT. (1935) § 241.14; *cf.* (1935) 19 MARQ. L. REV. 257. The debtor and creditor must, however, comply literally with the provisions of the statute or the security device is void. The mortgage is not merely ineffective against

creditors armed with process or against bona fide purchasers. Nor does it amount merely to a voidable preference in bankruptcy if the debtor permits the mortgagee to seize the goods covered by the mortgage. The mortgage is void in the sense that seizure by the creditor with the debtor's consent is a fraudulent conveyance and general creditors can reach the goods or the proceeds therefrom in the hands of the mortgagee. *Thomas Produce Co.* v. *Letman,* 184 Wis. 211, 199 N.W. 79 (1924). But filing of the mortgage and strict compliance with the provisions of the statute, particularly those provisions pertaining to the filing of inventories every four months, are not the only factors which the creditor must consider if he wishes to preserve his secured position. If the creditor-mortgagee permits the debtor-mortgagor to use the proceeds derived from the sale of goods covered by the mortgage for other purposes than paying off the indebtedness or replenishing the stock the security device is void. *Blakeslee* v. *Rossman,* 43 Wis. 116 (1877); *Ryan Drug Co.* v. *Hvambsahl,* 89 Wis. 61, 61 N.W. 299 (1894); *The Charles Baumbach Co.* v. *Hobkirk,* 104 Wis. 488, 80 N.W. 437 (1899); *Durr* v. *Wildish,* 108 Wis. 401, 84 N.W. 437 (1900). Here, too, the creditor armed with this void mortgage gets less protection than if he were a general unsecured creditor. His taking possession of the goods covered by the mortgage with the consent of the debtor-mortgagor is not merely a preference, it is in the words of the Wisconsin court a fraudulent conveyance as a matter of law. *The Charles Baumbach Co.* v. *Hobkirk, supra; Morley-Murphy Co.* v. *Jodar,* (Wis. 1936), 264 N.W. 926. The preferred creditor must account to any other attaching creditor, or trustee for creditors generally, even though the debtor has not been adjudged a bankrupt. *Morley-Murphy Co.* v. *Jodar, supra.* The instant case suggests that the mortgagee-creditor must in fact have permitted the debtor to use the proceeds as the debtor has wished or the security device is not void as a matter of law. If the mortgagee is a bank, and if the debtor is one of the bank's clients doing business in the same community, and if the debtor keeps his regular commercial account with the bank, it would seem that the creditor-bank will be deemed to have permitted unrestricted use unless the debtor has been discharging the indebtedness bit by bit at regular intervals. See *Ross* v. *State Bank of Trego,* 198 Wis. 335, 224 N.W. 114, 73 A.L.R. 225 (1929) and *Morley-Murphy Co.* v. *Jodar, supra.* If the mortgagee-creditor is a wholesaler or a manufacturer who has sold stock at intervals to the debtor, originally perhaps without security, and is not necessarily as familiar with the debtor's affairs as the latter's banker would be, the court has indicated in the principal case that permission to sell cannot rest upon inference alone. There must be some positive showing of fact as to the original understanding between the parties, or as to knowledge by the creditor of the business practices of the debtor. The burden which the Wisconsin court has thrust upon the banker-mortgagee is a heavy one. The court has not indicated what the basis of the accounting between the bank and the client-mortgagor must be. The cases do not suggest whether the unit accounting period must be every day, every week or every month. Nor has the court even considered how much of the proceeds from the sale of stock the debtor may set aside to carry business overhead and how much he must pay out to the secured creditor. *Cf. Ross* v. *State Bank of Trego, supra,* and *Morley-Murphy Co.* v. *Jodar, supra,* with the principal case.

VERNON X. MILLER.